BEST PRACTICES FOR WATER QUALITY TRADING
JOINT REGIONAL AGREEMENT

September 16, 2013

Meeting Summary: Workshop 3, August 21 – 22, 2013

Attendees: USEPA Region 10 (EPA R10), Idaho Dept. of Environmental Quality (IDEQ), Oregon Dept. of Environmental Quality (ODEQ), Washington Dept. of Ecology (WA DOE), Willamette Partnership (WP), and The Freshwater Trust (TFT)—See below for individuals

Thank you for your participation and efforts at the Best Practices for Water Quality Trading (WQT) Joint Regional Agreement (JRA) workshop held August 21 – 22, 2013 in Boise, Idaho. This memo includes agreed-upon action items, a list of documents provided at this meeting, and a brief synopsis of the meeting.

Action Items	Who	When
1. Adapt discussion guides/slides to reflect comments, post materials to WP website	WP/TFT	Completed 9/13/2013
2. Develop glossary, including definition of various terms related to baseline	WP/TFT	End of JRA process
3. Provide function oversight-role decision matrix	WP	Prior to Workshop #4
4. Draft strawman joint statement	TFT	Prior to Workshop #4
5. Distribute copy of NWEA July 2013 letter on TMDLs and trading	WP	10/1/2013
6. BMP Sub-group articulation of how BMP approval/update process occurs in each state	ID DEQ, ODEQ, WA DOE	Prior to Workshop #4
7. Agencies share effectiveness monitoring frameworks	Oregon DEQ (monitoring pyramid); EPA R 10 (effectiveness framework for natural programs)	10/1/2013

Meeting Documents

The following documents were distributed at this meeting:

- Workshop agenda
- Discussion Guides on the following topics: Verifying Project Implementation and Performance, Maintenance, and Recordkeeping Obligations; Components of BMP Guidelines; Adaptive Management & Effectiveness Monitoring; Sample Agreements; Permitting, Compliance, and Enforcement; Role of State Agencies, NPDES Permittees, and Third Parties
- Workshop slides

Please contact Bobby Cochran at the Willamette Partnership (cochran@willamettepartnership.org) for copies of these documents.

Meeting Summary

Attending:

- *U.S. Environmental Protection Agency*: Susan Poulsom, Christine Psyk, Claire Schary, Bill Stewart
- *Idaho Department of Environmental Quality*: Marti Bridges, Michael McIntyre, Barry Burnell
- *Oregon Department of Environmental Quality*: Gene Foster, Ryan Michie, Ranei Nomura, Jon Gasik
- *Washington Department of Ecology*: Helen Bresler
- *Willamette Partnership*: Bobby Cochran, Todd Gartner, Neil Mullane, Carrie Sanneman
- *The Freshwater Trust*: Joe Furia, Karin Power, Tim Wigington

I. Overview and Updates

Attendees asked about the status of Workshop #2 summary. TFT and WP are still revising based on additional input and comments received just prior to Workshop #3 from the agencies. Others inquired about the Oregon JRA open house. WP and Oregon DEQ thought the conversations were thoughtful, productive, and can inform the ongoing best practice development.

II. Reporting Project Implementation and Performance, Maintenance, and Recordkeeping

At the outset, agencies noted that 'project site monitoring' (as used in previous drafts of the discussion guide and the workshop slides) is not easily distinguished from actual, on-site water quality monitoring. Some suggested that a better term would be 'project implementation/performance confirmation' to distinguish assessment of BMP performance from direct water quality monitoring. Performance indices of on-the-ground work are important to review, measure (if scientifically and economically feasible), and integrate as programs develop, with periodic TMDL revisions potentially providing the time and opportunity for such an update.

A. Reporting Requirements for Project Implementation/Performance Confirmation

Attendees from other states were under the impression that third party confirmation of project implementation and performance was required in Oregon (either by guidance or in permits), and this was corrected. Agencies mentioned that conducting inspection for ongoing verification only once per year (as in the Oregon temperature context) and/or devising a uniform practice, may not be possible depending upon the site characteristics and nature of the BMP. An annual minimum, however, made sense to many, and a standard reporting format may be feasible. Comparable practices such as effluent limit monitoring and sludge reports are provided once per year and once per month, respectively.

B. Responsibilities for Reporting Project Implementation and Performance and Findings of Noncompliance

Attendees discussed upon whom the liability for project noncompliance should fall in trading programs. The Lower Boise program held project developers responsible, for example. Attendees concurred that although it is unlikely that permittees would be held liable for third party breach of contract or the intentional misrepresentations of third parties (i.e., beyond the reasonable control of the permittee), as with any project, permittees should choose their contractors prudently and investigate/review such parties' prior performance to make sure their credits are in good standing. EPA enforcement, as in other

programs, would be against the permit holder. The permit holder may have a breach of contract claim against the contractor.

C. *Frequency of Project Implementation/Performance Confirmations*

Attendees discussed the frequency with which project implementation/performance confirmation should occur at project sites. To this point, project developers have visited sites on an annual basis, which is consistent with the frequency of effluent limit monitoring. Attendees noted that some non-structural BMPs may require more frequent confirmations.

D. *Disclosure and Retention of Project Implementation and Performance Reports*

Attendees discussed the balance between public disclosure of information and protection of privacy/confidentiality, and noted that they believe that NRCS rules on information protection are likely too strict. Attendees agreed that WQT must be transparent, and that perhaps the best option is to provide all non-sensitive information upon request. In Oregon, reports on project implementation and performance are uploaded to an online registry, but disclosure of project information remains a sensitive subject in many trading programs. For example, in Ohio, landowner confidentiality and disclosure of private names and addresses in ongoing monitoring is a concern. Some attendees noted that not all data may be disclosed, given that some monitoring (e.g., drinking water locations) may reveal sensitive or critical areas. Attendees agreed that these reports should be retained according to the schedules outlined in permits.

III. *BMP Review and Acceptance*

As new BMPs are developed or suggested, attendees again considered the need for a screening and evaluation process of new practices so that project developers or other entities know what materials and details they need to provide an agency when suggesting a new BMP for approval. Attendees noted that agencies the value of a clear process for approval/disapproval, and if a BMP is not approved, clear direction as to the gaps. States examine practices differently: some perform the review internally, and others engage external subject experts to consider the scientific merits of a BMP. Primary barriers to adequate agency evaluation may be obtaining sufficient science, research, information, funding, and procedures for approval or disapproval. A Draft Best Practice has been developed through a series of two calls including a subset of JRA participants. Each state may have existing processes that would govern BMP review, the Draft Best Practice is intended to reflect these processes. It will be sent to the entire group following this workshop. Attendees discussed whether BMP approval/disapproval would require notice and comment procedures, and noted that the answer may depend on the formality of the process. In comparison, some attendees noted that point source proposed technological solutions are not submitted for notice & comment. Moreover, such approval may not be a final agency action because an agency may still choose to approve/disapprove a BMP action in a specific permit.

IV. Adaptive Management and Effectiveness Monitoring

Attendees discussed the potential for adaptive management and effectiveness monitoring under the current trading program frameworks in Oregon, Idaho, and Washington. Attendees again reiterated that trading is not a TMDL panacea (and so therefore, determining the impact of a trading program in isolation from overall improvements in water quality may be difficult), but that long-term adaptive management would provide important feedback loops to improve trading programs and to determine whether the combined impact of water quality programs is working. Attendees generally concurred that adaptive management would be conducive to testing assumptions over the life of programs. However, prior to engaging in this type of monitoring, attendees noted that it is important to match particular metrics to appropriate time horizons, and that the data needed to assess each metric must be collected.

Attendees also noted that there is a hierarchy of effectiveness metrics (ranging from # of permits issued, to numeric load reduction, to project/watershed performance, to improvements in salmon species and aquatic habitat values). Not all values can be attained/measured at different points.

Finding a balanced approach that provides both predictability for permittees (i.e., does not shift goalposts mid-way through) and informs the bigger picture of water quality attainment will be needed. The ancillary benefits to trading should also eventually be captured. However, the resources to take on this work and analysis are not currently available on a programmatic scale. Regardless, attendees agreed to consider what achievement and progress could be determined and how a plan for incremental improvement might be created.

V. Pilot Projects

Attendees asked what pilot projects might look like given that states may have differing priorities and circumstances to address. Oregon, Idaho, and Washington each thought that there were opportunities available in their respective states, and agreed to further consider what permittee characteristics or program scenarios would lend themselves to piloting the Draft Best Practices. Some attendees reiterated the importance of piloting so that this important work product does not become just another white paper.

VI. Form and Content of a Joint Regional Statement

Attendees were provided with a range of past or present credit-related sample MOUs and agreements from other trading programs to evaluate what form of documentation would best suit the process. Attendees generally agreed that memorialization of the trading best practice development would be nonbinding and informal, run the length of the time remaining under the USDA CIG grant (i.e., through 2015), and then expire. Some attendees liked the idea of a joint regional statement, while others were not certain that joint signatures would be needed. Some attendees also noted that the joint statement should provide USDA what it needs in terms of deliverables. The Freshwater Trust and Willamette Partnership will provide a draft strawman statement so that attendees can better evaluate the idea and content of a joint statement.

V. Permitting, Compliance, and Enforcement

A. *Permit Structure*

Attendees talked through the current structure of their NPDES permits and permit evaluation reports to see where best to plug in trading and programmatic requirements. All states include the same standard sections in their permits, but do not necessarily delineate them into sections in the same way (of note, the discussion guides/workshop slides are based on the Oregon method, which uses six "schedules" to cover the various standard components of the permit).

NPDES permits set effluent limits for end of pipe compliance or the mixing zone/zone of immediate dilution and identify compliance monitoring. Permits also set forth a compliance schedule timeline should a facility need additional time to design/build its solution. In discussing the requirement that compliance schedules be attained "as soon as possible," attendees noted that achievement of permit milestones would need a firm end date. The description and requirements of the trading program should be included in the permit's Special Conditions section. Attendees generally agreed that the permit (including the fact sheet and evaluation report) should allow the public to better understand the compliance route taken, and the timeline/milestones associated with that path.

A. Permit Content - Meeting Effluent Limits

Permits cannot be open-ended and must discern when a facility will meet its limits. A permit may include a description of the mechanism through which the permittee intends to come into compliance with its effluent limits. If the permittee chooses to use WQT to meet its limits, the permit should identify the units of measurement (i.e., the currency) and the required number of units of that currency needed to meet the limit in the permit. Attendees discussed the appropriate placement of this content—in either the effluent limit section, or in the trading program special conditions section—and generally agreed that this information might be appropriate to include in both sections of the permit. Attendees also discussed the merit of delineating between what component of an effluent limit must be met on-site, and what part can be met off-site via WQT.

B. Permit Content – Monitoring

Attendees agreed that a permit should require the monitoring necessary to determine compliance with effluent limits. This likely includes a mixture of on-site discharge monitoring, and disperse project implementation/performance confirmation. Attendees discussed the merits of including all of this information in this section of the permit versus inclusion of some WQT-related aspects in the Special Conditions section of the permit.

C. Permit Content – Compliance Schedules/Milestones

Attendees discussed the circumstance in which some credit-generating activities will extend into another permit cycle, and the appropriate mechanism for allowing permittees to meet permit limits over a longer period of time. One approach is to employ compliance schedules for water quality based effluent limits (WQBELs) that extend beyond the initial permit cycle. In these cases, the permit writer would describe the entire intended schedule in the permit, including interim milestones for credit acquisition and a note that credit acquisition/other milestones should be included in future permit cycles. Another approach is to use a consent decree or administrative order to supplement a compliance schedule in a permit. Utilizing this approach however, requires that a permittee first admit to a violation—a declaration that they often seek to avoid, and may not immunize permittees from third party challenges. A third option is to employ variances as longer-term compliance plans. Not all attendees were supportive of variances as an option. A fourth option would be to include a compliance schedule-like mechanism in TMDLs. Attendees were generally not in favor of this option. In general, attendees noted that NPDES permits should not be the only mechanism for motivating action by permittees—other early action mechanisms (such as MOUs or TMDL implementation plans) may allow permittees to get started on WQT-based compliance options before a permit is issued.

D. Permit Content – Trading Program

Attendees discussed what components of a program would need to be included and how to ensure the public has sufficient opportunity to review and provide comments on the program. Some attendees discussed the benefits of including trading elements earlier in the permit rather than later in order to make the program components more visible to the public for review and comment. Attendees also discussed the benefit of keeping all information about trading in one place, again for the purposes of clarity and transparency to the public.

Attendees discussed the level of detail that should be included to adequately describe the trading program within the permit. As each permit is tailored to the individual situation of the permittee, and only a handful of permits have included trading to date, the content and conditions of the program will continue to evolve. Attendees agreed that the amount of detail required in a permit will likely vary depending on

how much experience/exposure a facility has had to WQT. Attendees agreed that where additional detail on the trading program needs to be added to an existing permit, that information should be included in a permit amendment/management plan that would go through public comment and review.

E. Enforcement of Violations

Attendees noted that non-compliance with one section of a permit may lead to different consequences than for a violation of another section of the permit. Therefore, placement of content in one section of the permit versus another may have unintended enforcement consequences. Attendees also emphasized the importance of site screening, verification/certification, and public registration in terms of providing the public assurance/trust as to the compliance of entities that rely on WQT to meet their effluent limits.

VI. Agencies and Others in Market Operations

As requested by agencies in the first workshop, the Freshwater Trust led a discussion of the role of states, permittees, and third party administrators in developing and managing trading programs, including potential benefits and disadvantages of project screening (i.e., a preliminary assessment of the eligibility of certain sites), verification, and other credit and site implementation auditing mechanisms. As a framework for analyzing the cost, capacity, and time involved in performing these actions, TFT and WP provided state agencies a refresher on the Oregon trading program as it is currently being implemented by WP and TFT for Medford and other permittees. Attendees subsequently discussed whether these practices could or should be optional or required in future trading programs, and the appropriate timing of states' and EPA's involvement in programmatic development, inspection, and compliance oversight (e.g., early stages vs. later, upon credit generation). Standards development to date has been largely carried by recognized administrators such as WP, but absent the incorporation of such standards into agency rule or permits, any standards developed by third parties remain largely voluntary unless incorporated into permittee-project developer contracts. Some attendees saw value in participating in a greater oversight function, while others thought that significant deviation from current NPDES reporting and compliance procedures might be excessively burdensome on permittees and agency resources. Agencies asked for a more thorough decision matrix of the Oregon program hours, cost, and roles in order to better evaluate the mandatory or optional oversight mechanisms that may be performed by a state vs. permittee or third party. Attendees also discussed the potential information privacy and delegation issues associated with these decisions, but did not arrive at any conclusions.

VII. Next Steps

Before the next workshop in October, attendees will continue internal discussions and evaluations on potential pilots, baseline considerations, review a draft strawman statement, and consider stakeholder engagement.